No. 00-1469

In the Supreme Court of the United States

ESTHER BEIN AND WILLIAM BEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 41(e) provides that a person aggrieved by an unlawful search and seizure or by a deprivation of property may move for the return of seized property on the ground that such person is entitled to lawful possession of the property. The question presented is whether Rule 41(e) waives the government's sovereign immunity and authorizes courts to award damages against the government where the property at issue cannot be returned because it has been destroyed or otherwise disposed of.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-31) is reported at 214 F.3d 408. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33-34) was entered on June 5, 2000. A petition for rehearing was denied on December 5, 2000. The petition for a writ of certiorari was not filed until March 15, 2001, and is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of petitioners' arrest and prosecution in connection with charges of conspiracy and interstate transportation of stolen property.

1. On October 3, 1994, petitioners were arrested on charges of conspiracy and interstate transportation of stolen property. Pet. App. 1, 20. That same day, search warrants were executed at petitioners' residence and warehouse. *Ibid.* After a superseding indictment was filed, petitioners pleaded guilty to conspiracy to commit interstate transportation of stolen property and conspiracy to launder money. *Ibid.* At petitioners' March 15, 1996, sentencing hearing, the district court ordered the government to return to petitioners all items that had been seized. *Ibid.*; C.A. App. 425. The government returned certain items to petitioners; it later advised petitioners that any property that had not been returned had been destroyed. Pet. App. 21; C.A. App. 427.[1]

2. In May of 1998, petitioners filed a motion pursuant to Federal Rule of Criminal Procedure 41(e), in which they sought compensatory damages or return of the property. Pet. App. 19-21. Rule 41(e) provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the depri-

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[1] Between December 14, 1994, and November 20, 1996, the government had returned numerous seized items to petitioners. Pet. App. 3. Between April 9 and April 11, 1996, however, the government destroyed some items that had been seized. Pet. App. 4. Detective Conn explained that he had understood the district court's March 15, 1996, order as requiring the return of non-contraband items only. That interpretation of the district court's order, the district court later concluded, was "consistent with th[e] [c]ourt's intention." *Ibid.*

> vation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Petitioners alleged that the government improperly had destroyed 14 different types of property. Pet. App. 5-13.

After holding several evidentiary hearings, the district court granted petitioners' motion in part and denied it in part. Pet. App. 1-17. With respect to numerous items, the court concluded that petitioners had failed to satisfy their burden of proving either the item's existence or its value. *Id.* at 14. "Consequently," the court ruled, "the Government does not have any obligation with respect to these items." *Ibid.* The court found, however, that petitioners had met their burden of proof with respect to the existence and value of six carts, keys, wedding and bar mitzvah invitations, and a fax machine. *Id.* at 12, 15. The court directed the government to return the one cart still in its possession and to pay $2450 to petitioners in compensation for the remaining items, which had been destroyed. *Id.* at 15-17.

The district court also rejected the government's argument that it lacked jurisdiction to award money damages under Rule 41(e). Pet. App. 15. Postconviction motions for the return of property seized in connection with criminal proceedings, the court stated, are civil equitable proceedings. *Ibid.* Citing *United States* v. *Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987), the district court held that, once a party has invoked the court's jurisdiction by moving for the return of property, the court has jurisdiction to offer complete relief. The court stated that the government should not "be able to destroy jurisdiction by its own conduct," and that "[t]he government should not at one stroke be able to deprive the citizen of a remedy and render powerless the court that could grant the remedy." Pet. App. 15 (quoting *Martinson*, 809 F.2d at 1368). Finding that the government had destroyed the property after the court had ordered its return, the district court concluded that it had ancillary jurisdiction to award damages. *Id.* at 16. Petitioners later filed a motion to alter or amend the judgment to provide for additional damages; the district court denied the motion. *Id.* at 18.

3. Petitioners appealed, again seeking additional damages. Although the government did not appeal, it argued that petitioners were not entitled to additional compensation under Rule 41(e) because that rule does not accord district courts authority to award money damages against the government in the first place. Pet. App. 20. The Third Circuit agreed and vacated the district court's order insofar as it awarded money damages. *Ibid.*[2]

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[2] The appellate court left untouched the portion of the district court order directing the return of the cart. The court of appeals also affirmed the district court's order denying petitioners' motion

The court of appeals first observed that federal courts "do not have jurisdiction over suits against the United States unless Congress, via a statute, expressly and unequivocally waives the United States' immunity to suit." Pet. App. 23. "Moreover," the court continued, waivers of immunity "must be unequivocally expressed," and "any such waiver must be construed strictly in favor of the sovereign." *Id.* at 23-24 (citation and internal quotation marks omitted). Examining the text of Rule 41(e) in light of those principles, the court of appeals concluded that Rule 41(e) does not waive the United States' immunity with respect to claims for money damages. *Id.* at 26. Relying on the Fifth Circuit's reasoning in *Peña* v. *United States*, 157 F.3d 984, 986 (1998), the court explained that "Rule 41(e) makes no provision for monetary damages." Pet. App. 26. Instead, that rule "only provides for one express remedy—the return of property." *Ibid.* It is inappropriate for federal courts, the court continued, to "read into the statute a waiver of the federal government's immunity from [money] damages" where the text of the rule itself does not provide for such a waiver. *Ibid.* (quoting *Peña*, 157 F.3d at 986).

In cases between private parties, the court of appeals noted, the power of a court to grant equitable relief may also encompass authority to offer money damages to ensure relief is complete. Pet. App. 27. But whatever the merit of "this line of reasoning * * * in analogous situations with respect to a non-governmental entity," the court of appeals concluded that "it does not properly address" the issue of "sovereign

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to alter or amend the judgment since that motion challenged only the district court's refusal to award additional damages. Pet. App. 20.

immunity." *Ibid.* "In fact," the court continued, this Court concluded in *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999), that a "waiver of sovereign immunity does not extend beyond the express terms of the waiver," even where the relief sought is equitable in nature. *Ibid.* Similar reasoning, the court of appeals explained, applies here:

> [T]o the extent a court may read Rule 41(e) as a waiver of sovereign immunity, it must limit the waiver to the express terms of the rule. We reiterate that Rule 41(e) provides for one specific remedy—the return of property. Although courts treat a motion pursuant to Rule 41(e) as a civil equitable action, such a characterization cannot serve as the basis for subjecting the United States to all forms of equitable relief. A court must strictly construe the scope of a waiver of sovereign immunity in favor of the sovereign.

Pet. App. 28.

The court of appeals noted that, although the district court had erred, earlier case law had given that court "reason to believe" that Rule 41(e) permits district courts "power to award damages incident to the complaint." Pet. App. 20, 24 (citation omitted). The court of appeals rejected that theory, however, because it ignores the effect of sovereign immunity and the limited nature of the relief authorized by Rule 41(e). *Id.* at 26.

The Third Circuit also rejected the concern, expressed by the Ninth Circuit in *Martinson*, *supra*, and adopted by the district court in the opinion below, that the government should not be allowed to destroy property and thereby prevent a court from granting a remedy. "While we respect this policy argument," the

court stated, "it overlooks the fact that a determination of whether Rule 41(e) authorizes an award of damages raises a question not of mootness, but of jurisdiction. Moreover, application of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse." Pet. App. 25.[3] Accordingly, "[a]fter careful analysis," the court of appeals "reject[ed] the cases which allow an award of damages in a proceeding under Rule 41(e)," because they are inconsistent with the principle that a "Rule of Criminal Procedure that does not expressly provide for an award of monetary damages does not waive sovereign immunity." *Id.* at 26.[4]

Finally, the court observed that allowing a Rule 41(e) action for money damages could undermine the limitations set forth in the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*; 28 U.S.C. 1346(b)(1) (1994 & Supp. V 1999). The court of appeals noted that, in certain circumstances, 28 U.S.C. 2680(c) bars claims arising out of the "detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." "[G]ranting an award of damages under Rule 41(e)," the court concluded, "could allow a party to make a recovery pursuant to a procedural rule even though he or she would be barred from such

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[3] The court also pointed out that a more recent Ninth Circuit decision, *United States* v. *Woodley*, 9 F.3d 774 (1993), "appears to be contrary to [that court's prior] reasoning in *Martinson* to the extent [*Martinson*] held that a district court has jurisdiction to award monetary damages despite the fact that Rule 41(e) does not expressly provide for such an award." Pet. App. 25.

[4] The Third Circuit also concluded that, in view of its holding, it "need not address the broader question of whether rules of procedure, standing alone, can be found to constitute a waiver of sovereign immunity." Pet. App. 26 n.4.

recovery under a statute passed by Congress. Such a result would be incongruous as it would be directly contrary to the intent of Congress." Pet. App. 30.

ARGUMENT

Petitioners contend (Pet. 1-5) that the district court had authority, in proceedings under Rule 41(e) of the Federal Rules of Criminal Procedure, to provide a monetary remedy for destroyed property. This Court recently declined review in another case raising the same issue. *Jones* v. *United States*, cert. denied, 121 S. Ct. 2195 (2001). There is no reason for a different result here.

1. Because the United States is entitled to sovereign immunity, it "may not be sued without its consent," and "the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Waivers of sovereign immunity must be unequivocally expressed in statutory text, and are to be strictly construed in favor of the sovereign. *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). When the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) (citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)).

Applying those principles, this Court has recognized that, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Lane* v. *Peña*, 518 U.S. at 197 (citation omitted). See also *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990)

(plaintiff entitled to money from the Treasury only if Congress by law expressly so directs); *Automatic Sprinkler Corp. of America* v. *Darla Envtl. Specialists*, 53 F.3d 181, 182 (7th Cir. 1995) ("The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief."). Consequently, when an individual seeks an award of damages from the federal government, he must identify a statutorily or constitutionally recognized entitlement to money from the Treasury, and a waiver of sovereign immunity permitting him to assert that entitlement in court. See *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *Mitchell*, 463 U.S. at 216-217 (even where jurisdiction exists, the plaintiff "must demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal Government for the damage sustained" (emphasis added) (citations and internal quotation marks omitted)); *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against federal agency absent "a waiver of sovereign immunity" and a "source of substantive law [that] provides an avenue for relief"). See also *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993) ("The cases * * * dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them.").

Federal Rule of Criminal Procedure 41(e) provides neither a waiver of immunity to suits for monetary compensation nor a substantive right to monetary payments from the government. Instead, Rule 41(e) authorizes only one form of relief: District courts, Rule 41(e) specifies, may order the government to "return"

specified items of property to the property's rightful owner. As the Third, Fourth, and Fifth Circuits have all recognized, federal courts are not at liberty to supplement that authorized form of relief with an additional money damages remedy. Pet. App. 28; *Peña* v. *United States*, 157 F.3d 984, 986 (5th Cir. 1998); *United States* v. *Jones*, 225 F.3d 468, 469 (4th Cir. 2000), cert. denied, 121 S. Ct. 2195 (2001). To the contrary, the "available remedies" against the government are not "those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Lane* v. *Peña*, 518 U.S. at 197.

2. Petitioners' attempt to distinguish this Court's decisions in *Nordic Village*, *Lane* v. *Peña*, and *Blue Fox* is unavailing. Petitioners first argue that, in *Nordic Village*, "Congress ha[d] not empowered a bankruptcy court to order a recovery of money from the United States," Pet. 2 (quoting *Nordic Village*, 503 U.S. at 39); they argue that in this case "Congress has given express rights to district courts to render payment," *ibid.* (citing 28 U.S.C. 2414). *Nordic Village*, however, rested on the fact that there was no waiver of sovereign immunity, not the absence of a cause of action against the United States. See 503 U.S. at 39 ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief."). Here too there is no waiver of sovereign immunity. Rule 41(e) authorizes courts to order the return of property. But it nowhere waives the government's immunity to money damages claims such as petitioners'.

In any event, petitioners' attempt to distinguish *Nordic Village* rests on the mistaken premise that 28 U.S.C. 2414 gives them a privately enforceable entitle-

ment to money from the Treasury. See Pet. 2. Section 2414, however, merely authorizes the payment of district court judgments. It presupposes that a district court, before entering a money judgment payable under Section 2414, will have found both (1) a congressionally or constitutionally recognized substantive right to money from the Treasury and (2) the waiver of immunity that is a prerequisite to jurisdiction. See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (distinguishing between legislation waiving sovereign immunity such as 42 U.S.C. 2000e-5(k) and "prescriptions to facilitate payment of valid claims against the sovereign, notably, 31 U.S.C. § 1304 and 28 U.S.C. § 2414"). As this Court explained in *Republic National Bank of Miami* v. *United States*, 506 U.S. 80 (1992), 31 U.S.C. 1304 and 28 U.S.C. 2414 do not "create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." 506 U.S. at 95 (quoting *OPM* v. *Richmond*, 496 U.S. at 432). Here, Rule 41(e) does not give petitioners a "substantive right to compensation" for lost property, much less waive the government's immunity to suits seeking such compensation.

Respondents also attempt to distinguish *Lane* v. *Peña*, *supra*. *Lane*, they argue, was "not a case [in] which a right of action exists to enforce a federal right and Congress is silent on the question of remedies." Pet. 2-3 (quoting 518 U.S. at 197 (citation and internal quotation marks omitted)). This, however, is not such a case either. Far from creating a right of action and being silent on remedies, Rule 41(e) speaks directly to the issue of remedies by authorizing one remedy and one remedy alone—the return of the property. Because

Rule 41(e) does not authorize the further remedy of money damages, federal courts may not, consistent with *Lane* v. *Peña*, create such a remedy (and waive the government's immunity to suits seeking it) on their own.

Finally, petitioners attempt to distinguish this Court's decision in *Blue Fox*, *supra*. In *Blue Fox*, this Court held that a plaintiff could not bring an "equitable lien" claim under the waiver of immunity provided by the Administrative Procedure Act (APA), 5 U.S.C. 702. See 525 U.S. at 257. The APA waives the government's immunity with respect to claims for judicial review of agency action, but excepts from the waiver (among other things) suits seeking "money damages." 5 U.S.C. 702. Money damages, this Court has explained, is money given as "compensation for an injury to [the claimant's] person, property, or reputation," or as a "substitute" for a legal duty the government allegedly breached. *Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 895 (1988). In *Blue Fox*, the Court rejected the claim that federal courts could order monetary relief under the APA's waiver of immunity whenever such relief could be characterized as "equitable." 525 U.S. at 262 ("[T]he equitable nature of the" relief sought "does not mean that its ultimate claim was not one for 'money damages.'"). Instead, the Court explained, the "crucial question" under the APA is whether the remedy sought is one for which Congress has waived immunity or an award of "money damages" for which Congress specifically chose to withhold waiver. *Id.* at 261. Similarly here, the crucial question under Rule 41(e) is whether the relief that petitioners seek is the "return of the property" authorized by that Rule, or some other form of relief, which Congress has not authorized and

for which Congress has not waived the government's immunity.

Petitioners further assert that *Blue Fox* is distinguishable because, in that case, the plaintiff sought the "substituted relief of a lien" in an action where money was to be "the end all-be all of" the suit. Pet. 3. Petitioners assert that, unlike the plaintiff in *Blue Fox*, they would rather have their property back. *Ibid.* Even if that were true, the only question in this case is whether a district court can order the payment of money damages under Rule 41(e) as compensation where property cannot be returned, *i.e.*, as a substitute for the property that petitioners cannot recover. Petitioners concede as much in their question presented, which asks whether district courts have "civil equitable powers * * * to compensate an individual for destroyed property." Pet. i. Because Rule 41(e) does not by its terms authorize such compensatory awards, and certainly does not waive the government's immunity to them, petitioners' damages claim was properly rejected.[5]

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[5] Petitioners also assert that their property still exists; that the only testimony supporting destruction was from a witness who was a "stipulated perjurer"; and that the only evidence of destruction was a document "stipulated to be false." Pet. 3. Petitioners further claim that the prosecutor had suborned perjured testimony because nobody knew where the property was. *Ibid.* See also Pet. 4. That factbound claim does not warrant further review. Although there was a disagreement between two government witnesses concerning whether the FBI case agent authorized, participated in, or was aware of, the April 1996 destruction of some of petitioners' property, see C.A. App. 29-30, 66-76, 147-152, the district court made no finding of perjury. Rather, the court found that petitioners had failed to establish the existence of numerous items for which they sought compensation and that many of their

3. Petitioners also argue that, unlike the Third and Fifth Circuits, the Second, Fourth, and Ninth Circuits permit damages to be awarded under Rule 41(e). Pet. 2 (citing *United States* v. *Martinson*, 809 F.2d 1364 (9th Cir. 1987); *Mora* v. *United States*, 955 F.2d 156 (2d Cir. 1992); *United States* v. *Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997)). That claimed division in the circuits does not warrant this Court's review.

As an initial matter, petitioners are incorrect to claim that the Fourth Circuit permits money damages to be awarded under Rule 41(e). In *United States* v. *Jones*, 225 F.3d 468 (2000), cert. denied, 121 S. Ct. 2195 (2001), the Fourth Circuit held that Rule 41(e) does *not* authorize federal courts to award damages against the United States:

> Rule 41(e) does not contain a waiver of sovereign immunity. We therefore agree with the Third and Fifth Circuits that courts lack jurisdiction to award damages under Rule 41(e).

225 F.3d at 470 (citation omitted). In so holding, the Fourth Circuit distinguished *Kanasco*, *supra*, the case on which petitioners rely, on the ground that *Kanasco* did not directly address the issue of sovereign immunity. "Because *Kanasco* did not address the effect of sovereign immunity on the legal jurisdiction of the courts in the Rule 41(e) context," the *Jones* decision explained, the court was "free to address the issue" in *Jones*. 225 F.3d at 469.

The remaining cases petitioners cite as contrary authority are distinguishable for the same reason. Like *Kanasco*, they do not squarely address whether Rule

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allegations lacked credibility. See Pet. App. 5-13 (Findings of Fact 35, 43, 49, 71, 75, 80, 84, 89, 91, 94, 99, 109).

41(e) creates a substantive entitlement to money from the Treasury and provides a waiver of immunity permitting that entitlement to be asserted in court.[6] As a result, those cases do not bind the courts of appeals to any particular outcome in cases in which those issues are raised. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (citation omitted). The Fourth Circuit concluded that it was not bound by its own earlier decision in *Kanasco* for that reason; the Third Circuit in this case distinguished its prior rulings in this area on similar grounds, Pet. App. 30-31; and the Ninth Circuit has issued a decision suggesting that it would be inclined to do likewise, *id.* at 25-26.[7] There is

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[6] The same is also true of cases such as *United States* v. *Solis*, 108 F.3d 722, 723 (7th Cir. 1997) (dictum); *United States* v. *Sanders*, 48 F.3d 1233 (10th Cir. 1995) (Table); *United States* v. *Rotzinger*, 47 F.3d 1174 (7th Cir. 1995) (Table); *Thompson* v. *Covington*, 47 F.3d 974 (8th Cir. 1995).

[7] As the court of appeals explained (Pet. App. 25-26), the Ninth Circuit has already issued one decision suggesting that *Martinson* should not be read as resolving the sovereign immunity issue. In *United States* v. *Woodley*, 9 F.3d 774, 781-782 (9th Cir. 1993), the Ninth Circuit held that Federal Rule of Criminal Procedure 16(d)(2), which authorizes courts to "prescribe such terms and conditions as are just" to remedy violations of discovery orders, does not authorize the imposition of a monetary remedy against the government. If the broader grant of authority to "prescribe such terms and conditions as are just" does not authorize federal courts to award money damages against the government, it follows *a fortiori* that the narrow authority to order the return of property in Rule 41(e) does not either. Pet. App. 26.

no reason to believe that the other courts of appeals will not reach similar conclusions.

In any event, even if some of the earlier court of appeals decisions upon which petitioners rely could be read as addressing the issue of sovereign immunity, cf. *Martinson*, 809 F.2d at 1368 n.2, those decisions predate this Court's decisions in *Lane* v. *Peña* or *Blue Fox*, *supra*. *Lane* v. *Peña* makes it clear that, when Congress waives immunity with respect to a cause of action, the only available remedies are those for which sovereign immunity has been expressly waived. *Lane* v. *Peña*, 518 U.S. at 197. Here, Rule 41(e) permits only one form of relief—return of the property—and nowhere contemplates damages awards. Moreover, while courts of appeals at one time might have assumed that they could award damages against the government as an "incident" to a Rule 41(e) proceeding without a waiver of immunity because the action is "equitable," *Blue Fox* makes it clear that such an assumption is incorrect. Even if the proceeding or cause of action is considered "equitable," courts are prohibited from awarding money damages against the government in the absence of an unambiguous statute waiving the government's immunity. *Blue Fox*, 525 U.S. at 261, 262. See also pp. 5-7, 12-13, *supra*. In light of those decisions, Rule 41(e)'s mandate for return of property cannot be read as waiving the government's immunity with respect to, and according claimants a substantive right to, monetary compensation from the government.

4. Finally, petitioners argue that, even if there is no waiver of sovereign immunity, "equity would still demand a return of some of the monies ordered forfeit by the District Court." Pet. 3. In particular, petitioners rely heavily on the fact that they were ordered to forfeit money as part of their criminal sentences.

Because the government could have attached petitioners' property had petitioners not paid their $150,000 forfeiture, petitioners contend that "the converse" right — *i.e.*, the right of petitioners to attach the money in the Treasury based on the government's inability to return otherwise returnable property—"must equitably exist." Pet. 4.

That case-specific contention does not warrant review. As an initial matter, neither the court of appeals nor the district court addressed petitioners' argument that they were entitled to offset their damages, retroactively, against the already completed criminal forfeiture. This Court ordinarily does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). Petitioners, moreover, were subject to lawful criminal forfeitures under 18 U.S.C. 982(a)(1), 982(b)(1)(a) and 1956(h).[8] They cite no authority for the proposition that convicted offenders may set off debts

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[8] Section 982(a)(1) provides in pertinent part that "[t]he court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Petitioners pleaded guilty to violating 18 U.S.C. 1956(h). C.A. App. 411-414. As this Court explained in *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998), Section 982(a)(1)

> descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. See W. McKechnie, Magna Carta 337-339 (2d ed. 1958); 2 F. Pollock & F. Maitland, The History of English Law 460-466 (2d ed. 1909).

allegedly owed to them by the government against a forfeiture penalty entered against them in a criminal case.

In any event, because petitioners' forfeiture was lawful, and because the forfeited sums were paid into the United States Treasury, sovereign immunity precludes petitioners' effort to treat the forfeited money as an available "fund" from which they can recover compensation. It is well established that "sovereign immunity bars creditors from attaching or garnishing funds in the Treasury, see *Buchanan* v. *Alexander*, 4 How. 20 (1845), or enforcing liens against property owned by the United States, see *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) * * *." *Blue Fox*, 525 U.S. at 264. Nothing in Rule 41(e) suggests that Congress intended to alter that settled principle where, as here, a party does not seek recovery of his own property from the government, but instead seeks money from the Treasury as compensation for a suffered loss.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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